

California Department of Transportation

**Caltrans Rebuttal Paper for the Dispute Review Board**

Regarding

**Notice of Potential Claim No. 10,**

**Temporary 1% Increase in Statewide Sales and Use  
Tax**

for the

**Oakland Touchdown Project**

**Contract No. 04-0120L4**

Date: February 5, 2010

Contractor: **MCM Construction, Inc.**

Senior Resident Engineer: **Ben Ghafghazi, P.E.**

## **CALTRANS' REBUTTAL**

---

In response to the position paper submitted by MCM, Inc, the Department of Transportation offers the following rebuttals:

### **Rebuttal 1:**

In its position paper, the Contractor ignores the fact that the courts have already held that the State is not obligated to pay a public works contractor additional monies for increased state sales and use taxes.

### **Rebuttal 2:**

The Contractor uses terms such as "ordered," "mandated," "direction by the State," "directive of the State," and other such language. A statewide sales tax increase is neither an order, a mandate, or a direction. With regard to this dispute, nobody ordered, mandated, or directed the contractor to do anything. The dispute is based on the increase of a tax levied on tangible property -- it applies to anyone who buys anything in the State of California, i.e. it is public and general.

### **Rebuttal 3:**

The Contractor writes: "The Work, as that term is used in the Contract, includes all items shown or contemplated in the Contract to construct the improvement, including all changes made by the State." This misstates the definition found in Section 1-1.48 of the Standard Specifications which only provides for "alterations, amendments or extensions thereto made by contract change order or other written orders of the Engineer." The "Work" contemplated and embraced by the contract does not include changes in the sales tax imposed by the State Legislature, and the Engineer made no change that led to this dispute.

### **Rebuttal 4:**

The Contractor also cites Section 4-1.03C, "Changes in Character of Work," as one of the bases for its claim. This section is predicated on an ordered change in the plans or specifications. As stated previously, in this case, neither the plans nor the specifications have changed.

### **Rebuttal 5:**

The Contractor goes on to cite a recent arbitrator's ruling regarding Wage Order 16 in support of its position. The Wage Order 16 ruling is not relevant to this sales tax dispute, the ruling is not case law, not precedent-setting, and is both legally and contractually flawed. The Department has not implied acceptance of this ruling nor

does it accept the premise that when an arbitrator's decision goes against it, the Department revises its specifications. We encourage the DRB Board to review Appendix C-10, "Response to Argument that 1% Sales Tax Increase Dispute is Equivalent to the Wage Order 16 Dispute," of the Department's position paper for a detailed rebuttal to this argument.

#### **Rebuttal 6:**

The Contractor states in its position paper, "It should be of no consequence whether the new law is enacted by the Legislature of the State or a regulatory agency of the State." The fact is, in determining responsibility for payment for this sales tax increase, it is important to identify who initiated the change. The Sovereign Acts Doctrine allows the State Legislature, in its role as a sovereign, to enact laws for the public benefit without increasing its liability under a contract to which the state (or a department of the state) is a party.

#### **Rebuttal 7:**

Finally, the Contractor notes that the DRB members are experienced in contract compliance, foreseeability of contract burdens, as well as matters of equity and fairness. While the Department agrees with this assertion, the Dispute Review Board's standards for review of disputes requires the DRB to make recommendations based solely on the facts and circumstances involved in the dispute, pertinent contract provisions, applicable laws and regulations, even if the result of applying the applicable law and contract provisions may seem "unfair" or "unjust."

## **SUMMARY**

---

The California Department of Transportation finds the Contractor's claim has no merit based on the following:

- The courts have already held that the State is not obligated to pay a public works contractor additional monies for increased state sales and use taxes.
- The Department did not order, mandate, or direct the Contractor to pay the increase in sales tax.
- The "Work" contemplated and embraced by the contract does not include changes in the sales tax imposed by the State Legislature, and the Engineer made no change that led to this dispute.
- Standard Specifications Section 4-1.03C, "Changes in Character of Work," is predicated on an ordered change in the plans or specifications. Neither the plans nor the specifications have changed.
- The Wage Order 16 ruling is not relevant to this sales tax dispute, the ruling is not case law, not precedent-setting, and is both legally and contractually flawed.

- The Sovereign Acts Doctrine allows the State Legislature, in its role as a sovereign, to enact laws for the public benefit without increasing its liability under a contract to which the state (or a department of the state) is a party.
- The Dispute Review Board's standards for review of disputes requires recommendations based solely on the facts and circumstances involved in the dispute, pertinent contract provisions, and applicable laws and regulations.